STATE OF MICHIGAN

COURT OF APPEALS

KAY INVESTMENT COMPANY, LLC,

Plaintiff-Appellee,

v

BRODY REALTY I, LLC,

Defendant-Appellant,

and

GEORGE BRODY TRUST and ROBERT BRODY,

Defendants.

FOR PUBLICATION
December 28, 2006
9:15 a.m.

No. 263549
Wayne Circuit Court
LC No. 04-436963-CZ

Official Reported Version

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

SCHUETTE, J. (*dissenting*).

This case involves the disputed ownership of real property and the question whether a "joint venture" initially created among four individuals from two families—the two Brody brothers and the two Kaufman brothers—evolved over time into a relationship as co-owners of a business for profit, evidencing a partnership under MCL 449.6.

A review of pertinent Michigan case law reveals a fine line and a thin distinction between what constitutes a partnership or a joint venture. My distinguished and thoughtful colleagues in the majority have determined that the business relationship of the parties and the ownership of the real estate, a shopping center, indicate a joint venture. I disagree.

I respectfully conclude that the conduct and actions of the parties over the course of their business relations established a partnership because they "carr[ied] on as co-owners a business for profit." MCL 449.6(1); see also *Byker v Mannes*, 465 Mich 637, 645-646; 641 NW2d 210 (2002).

Our Supreme Court in *Byker* held that the subjective intent among individuals to create a partnership is not required if their actions and conduct demonstrate the intent or desire to carry on a business for profit. *Id*. at 653. Keeping a statutory focus firmly in mind, Justice Markman stated: "Pursuant to MCL 449.6(1), in ascertaining the existence of a partnership, the proper

focus is on whether the parties intended to, and in fact did, 'carry on as co-owners a business for profit' and not on whether the parties subjectively intended to form a partnership." *Id*.

The *Byker* decision provides instruction and guidance to this case. As Justice Markman expressed, past decisions of our Supreme Court have used "imprecise language" and caused some "confusion" regarding what constitutes a partnership. *Id*. at 650-651. The starting point in any analysis must commence with a review of the pertinent statutory provisions, MCL 449.6 and 449.7. The subjective intent of the parties is conspicuously absent in the enumerated items to be considered when determining whether a partnership exists. See MCL 449.7.

> That is, if the parties associate themselves to "carry on" as co-owners a business for profit, they will be deemed to have formed a partnership relationship regardless of their subjective intent to form such a legal relationship. The statutory language is devoid of any requirement that the individuals have the subjective intent to create a partnership. Stated more plainly, the statute does not require partners to be aware of their status as "partners" in order to have a legal partnership. [*Byker, supra* at 646.]

Justice Cooley, quoted extensively in *Byker*, clearly outlined the differences between individuals' subjective intent and their conduct in a business relationship:

> "If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities.
>
> "It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable." [*Byker*, *supra* at 648-649, quoting *Beecher v Bush*, 45 Mich 188, 193-194; 7 NW 785 (1881).]

Likewise, in *McCormick v McCormick*, 342 Mich 525, 530; 70 NW2d 706 (1955), our Supreme Court held that disputed property was owned by a partnership, explaining that it was the parties' behavior that led to that conclusion, and "[i]t was not essential that [the parties] should call themselves partners . . . [or] that the record title should stand in the names of all partners."

In this case, in 1969, the parties commenced their business relations in the form of a joint venture, for a specific term of ten years, with the stated plan to construct a shopping center. The shopping center was completed by the late 1970s, and the mortgage was paid off in 1985. Interests of the original joint venturers were transferred to trusts or other companies, as one of the Kaufman brothers died and successors to the original contracting parties assumed ownership roles in the business. The record reflects that the parties filed Schedule K-1 forms each year on their federal income tax returns, declaring each partner's share of income, credits, deductions,

etc. The record also reflects that each founder declared his profits or losses in an amount equal to his share of the business.

The parties' conduct over time, Justice Cooley's admonition, and the *Byker* holding cause me to conclude that the parties carried on a business for profit, giving rise to a partnership specific to the ownership of the property in dispute. The parties' conduct and actions, not their subjective intent or whether they considered themselves partners, is the core determination to be made in this case. See *Byker*, *supra* at 649.

I would affirm the trial court's decision.

/s/ Bill Schuette